Supreme Court, U. S.
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IN THE

United States Supreme Court

No. 77-751

GABRIEL HAGENDORFER,

Petitioner

versus

STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS STATE OF ALABAMA

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IN THE UNITED STATES SUPREME COURT

No.

GABRIEL HAGENDORFER,
Petitioner,

versus

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

Comes now Petitioner, Gabriel Hagendorfer, and prays that a Writ of Certiorari be issued to review the judgment of the Alabama Court of Criminal Appeals entered in the above styled case on May 24, 1977.

OPINIONS BELOW

A copy of the opinion of the Alabama Court of Criminal Appeals, 1 Div. 784, rendered May 24, 1977, is appended hereto

together with a letter from said Court evidencing its denial of Petitioner's application for rehearing, and a copy of the Supreme Court of Alabama's denial of Petitioner's Petition for Writ of Certiorari to said Court, cited as SC 2710 and rendered August 26, 1977, with no opinion. The foregoing are found in this Petition's Appendix at pages 1a - .

JURISDICTION

Petitioner was convicted of the crime of unlawfully selling marijuana contrary to the provisions of the Alabama Uniform Controlled Substances Act in the Circuit Court of Baldwin County, Alabama on November 8, 1976. The Court of Criminal Appeals affirmed the judgment on May 24, 1977. An application for rehearing was filed on June 7, 1977 and was denied a petition for Writ of Certiorari on

August 26, 1977. The jurisdiction of the United States Supreme Court is invoked on the ground that the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution of the United States, and on the ground that the Petitioner was otherwise deprived of his rights under the United States Constitution. These aforementioned jurisdictional grounds, together with the fact that a decree rendered by the highest Court of a State (Alabama) is sought to be reviewed, confer upon the United States Supreme Court jurisdiction to grant this petition, pursuant to Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

(a) Whether the classification provision in Title 30 Section 97(1), Code of Alabama of 1940 (Recomp. 1958), discrimi-

nates between members of the same class, and between persons similarly situated, by the use of an arbitrary, unreasonable, and capricious population classification so as to deny this Petitioner the constitutional guarantees of equal protection of the law, and to violate the constitutional provisions regarding privileges and immunities, by authorizing an improper question posed by the prosecutor as to whether the jury was to be kept together, thereby jeopardizing the right of Petitioner to allow separation of the jury during trial and ingratiating the prosecution in the minds of the jurors by demonstrating the state's solicitude of their convenience? Since the population classification rendered the statute inapplicable to trials in counties such as Baldwin, where Petitioner was tried, it de-

prived the Petitioner of the statute's protective provisions regarding comments in the jury's presence.

(b) Whether the Alabama Court of Criminal Appeals erred in holding that there was no fatal variance nor denial of due process of law inherent in the conviction of Petitioner under an indictment charging a sale of marijuana to agent William Womack when the Trial Court found a "one joint transaction" sale to both Womack and Deputy Sheriff Roland Howell? In support of its holding, the Court of Appeals stated that the name of the marijuana vendee was not necessary, and furthermore, there was no fatal variance issue raised during the trial.

(c) Whether the case of Duin v. State, 288 Ala. 329, 260 So. 2d 602(1972), should be overruled on the ground that it

provides precedent contrary to the constitutional guarantees of due process of law evidenced by the Fourteenth Amendment and as supported by the United States Supreme Court? Duin v. State supports the following proposition: that where an indictment charges a sale of marijuana to one person and proof is adduced at trial of a sale to two persons of the same contraband under a theory of "one joint transaction", such an indictment is sufficient to support a judgment of conviction.

STATUTES AND REGULATIONS

The statutes, regulations and rules which the case involves are the following:

1. Code of Alabama of 1940, (Recomp. 1958) Title 30, Section 97(1). Separation of jury by consent. The provisions

section shall apply only in the Circuit Court in counties having a population of 140,000 or more according to the last or any subsequent federal census.

If the accused and his counsel and also the prosecuting attorney, in any prosecution for felony, whether capital or non-capital consent thereto in open court, the trial court in its discretion may permit the jury trying the case to separate during the pendency of the trial, whether the jury has retired or not. A separation so permitted shall not create a presumption of prejudice to that accused, but on the contrary it shall be prima facie presumed that the accused was not prejudiced by reason of the separation of the jury.

It shall be improper for the trial court to ask the accused, counsel for the

accused, or the prosecuting attorney in the hearing of the jury whether or not he or they will consent to a separation of the jury pending the trial. It shall be improper for the accused or counsel for the accused, or the prosecuting attorney to state to the trial court in the hearing of the jury that he or they consent to a separation of the jury pending the trial. (1943. p. 358, appvd. July 8, 1943.) This statute now codified as Code of Alabama, 1975, Section 12-16-9.

2. AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS: EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and sub-

ject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the

Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an

executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obli-

gations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. 28 U.S.C. § 1257. State Courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c.646,62 Stat. 929.

STATEMENT OF THE CASE

The Petitioner Gabriel Hagendorfer (hereinafter referred to as "Defendant") was charged with sale of a controlled substance by a Baldwin County Court Com-

plaint on the 30th day of August, 1976. He was indicted by the Baldwin County Grand Jury on October 15, 1976, and was arrested on that indictment on October 25, 1976. On October 26, 1976, the Defendant was arraigned on the indictment and pled "not guilty." The Defendant was brought to trial on the indictment, was tried on the indictment and was pronounced guilty of the charge in the indictment on November 8, 1976. On the same date, the Trial Court adjudged the Defendant "guilty" on the verdict and sentenced the Defendant to serve six (6) years in the state penitentiary. The Defendant by his attorney (not Defendant's attorney on appeal), gave oral notice of appeal and entered written notice of appeal. The Alabama Court of Criminal Appeals affirmed the judgment on

May 24, 1977. An application for rehearing was filed on June 7, 1977 and was denied on June 28, 1977. A Petition for Writ of Certiorari was filed with the Supreme Court of Alabama on July 12, 1977 and was denied on August 26, 1977.

The first federal question sought to be reviewed, pertaining to the constitutionality of Code of Alabama, Title 30, Section 97(1) (Recomp. 1958), was raised for the first time in Defendant's brief filed in support of his appeal to the Alabama Court of Criminal Appeals, and again in Defendant's brief filed in support of his Petition for Writ of Certiorari to the Supreme Court of Alabama. The second and third federal questions sought to be reviewed, pertaining to the fatal variance between the indictment and the evidence adduced at trial,

were also raised for the first time by Defendant's brief on appeal to the Alabama Court of Criminal Appeals, and again in his brief filed in support of his Petition for Writ of Certiorari. In all instances above, these federal questions, as raised by the Defendant, were overruled by the aforementioned Appellate Courts' affirmation of the Defendant's conviction and denial of his Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

It is the Petitioner's position that all three of the federal questions sought to be reviewed are of a character warranting consideration by the United States Supreme Court, due to the fact that the Alabama Appellate Courts mentioned above decided each in a manner probably not in accord with applicable

decisions of said United States Supreme Court.

ARGUMENT

In support of Petitioner's position and pursuant to U.S. Supreme Court Rule 23(1)(h), Petitioner offers the following argument as amplification of each federal question heretofore raised:

A. Title 30 Section 97(1) As Unconstitutional

A comment by way of question made by the Prosecuting Attorney at the trial (R.39) wherein he said "Are you going to keep them together?", is a remark which can only be prejudicial to the right of the Defendant to allow separation of the jury during trial. The net effect of such a comment is to ingratiate the Prosecution in the minds of the jurors by demonstrating the State's solicitude

of their convenience. It is a comment, the tenor of which, the legislature was attempting to remove in its entirety by the enactment of Act No. 384 of the 1943 Regular Session of the Alabama Legislature, now codified in Code of Alabama of 1940 (Recomp. 1958) in Title 30, Section 97(1), as set forth verbatim in the foregoing Section entitled "Statutes and Regulations".

The intent of the legislature is clear in the Act, i.e. to remove prejudicial effect of separation of jury agreements. It is of little avail to have such a rule, that the trial court cannot ask a defendant if he will consent to a separation and to then let an officer of that court acting for the State to ask such a question. A condonation of such a state of facts would emasculate the end

of the statute's intent in that regard. The Defendant contends that he, as well as all other felony defendants being tried before a jury, have the right to such protection and privilege, and the legislature's error in placing territorial limits on these rights is unconstitutional.

The Defendant contends that Title 30 Section 97(1) violates the law in constitutional magnitude since this Section would deny the Defendant the statutory protection afforded some others in his class from being prejudiced by an improper query from the Prosecutor as to whether the Defendant was going to keep the jury together, which denial is a violation of both the privileges and immunities prohibition and the equal protection clause of the 14th Amendment to the Uni-

ted States Constitution.

The constitutional provisions relating to privileges and immunities are especially significant where classification and class legislation are involved. As applied to legislation obnoxious to the constitution, the terms "classification" or "class legislation" are those which make improper discrimination conferring privileges or immunities on a class arbitrarily from a large number of persons standing in the same relation to the privileges or immunities, without reasonable distinction or substantial difference. Pfeiffer Brewing Company v. Bowles, 146 F 2d 1006. (See, generally 16A C.J.S. Constitutional Law,Section 489 et seq.) Class legislation is invalid where the classification is arbitrary and unreasonable.

The provision of the Fourteenth Amendment to the Constitution of the United States decreeing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, voids those parts of state statutes which made any unreasonable or arbitrary discrimination between different persons or classes of persons. Under the provisions of the State and Federal constitutions, the same rules are applied as to the validity of classifications made in legislative enactments. Though most legislatures have the power to classify, discrimination is the essence of classification and does violence to the Constitution when the basis of the discrimination is unreasonable. See Harlow v. Ryland, 78 F 784 (D.C.Ark.).

There is no general rule by which to distinguish reasonable and lawful and unreasonable and arbitrary classification, the question being a practical one depending on experience, and varying with the factor of the case. Pacific Gas and Electric Company v. Montgomery, 98 p.2d 819, 37 Cal.App.2d 91. In order to be valid, a statutory classification must reasonably promote some object of welfare or interest, must rely on real and substantial differences, having a natural, reasonable, and substantial relation to the subject of the legislation, and must affect alike all persons or things within a particular class, or similarly situated. City of Alexandria v. Beard, 47 So.2d 553, 217 La.820, affirmed 71 S. Ct. 920, 341 U.S.622, 35 A.L.R.2d 335; Crandon v. Hazlett, 26 So.2d 638,157 Fla.

574. U.S. v. Bendik, 220 F 2d 249 (C.A.N.Y.). (And see generally the cases cited in the footnote to 16A C.J.S. Constitutional Law, Section 489.)

It has been stated above that there must be real and substantial differences upon which to base a population classification. Likewise, it must have a substantial relation to the subject of the legislation. A particular Supreme Court decision summarizes the view of many former decisions and further refines what the criteria are for determining whether a rational basis for classification exists. The U.S. Supreme Court in Eisenstadt v. Baird,405 U.S. 438, 31 L. Ed.2d 349, 92 S.Ct.1029, has said;

"The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As The Chief Justice only recently explained in Reed v Reed, 404 US 71, 75-76,

30 L Ed 2d 225, 229, 92 S.Ct.251 (1971).

'In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 US 27[28L Ed 923, 5 S.Ct. 3571] (1885); Lindsley v. Natural Carbonic Gas Co. 220 US 61 [55 L Ed 369, 31 S.Ct.3371(1911); Railway Express Agency v.New York, 336 US 106 [93 L Ed 533, 69 S.Ct.463](1949); McDonald v.Board of Election Commissioners, 394 US 802[22 L Ed 2d 739, 89 S.Ct.1404] (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 364 US 412, 415 [64 L Ed 989, 990, 40 S.Ct.560] (1920)."

It has been said that where legislation is classified as to localities as it is in this law herein being considered, that the law must apply to all persons who

are similarly situated in such localities and to all parts of the state where like conditions exist. (Emphasis added). Badenoch v. Chicago, 78 N.E.31,222 Ill,71; People v. Marcello, 25 N.Y.S.2d 533;Malone v.Williams,118 Tenn.390. And a classification of cities or other territorial subdivisions according to population is invalid if it is arbitrary, unreasonable or unjust.

The constitutional prohibition against class legislation does not deprive the legislature of all discrimination in defining the class to which an act would apply, but when the classification attempted is clearly arbitrary, unreasonable, and unjust the court will review its discretion. Smith v. Wolf, 49 So. 395 160 Ala. 644. Classification by statute must not be arbitrary, must not

be arbitrary, must not be a subterfuge to shield one class and duly burden another, and must not unduly oppress in its administration. Al Means, Inc. v. City of Montgomery, 114 So. 2d 816, 268 Ala.31. It is essential that legislative classification be reasonable and not arbitrary, and that it not be based on material and substantial distinctions and differences reasonably related to the subject matter in the legislation and that there be uniformity within the class. Al Means, Inc. v. City of Montgomery, supra.

Any state action which discriminates against segments of its population is subject to "strict scrutiny". The state must demonstrate not merely a reasonable justification for the distinction it draws between citizens, it must show a compelling state interest. Thomas v.Mims,

317 F. Supp.179(D.C.Ala.1970).

A statute which is designed and intended to remove the possibility of favoritism or prejudice for or against the State or a defendant in a criminal case which may occur by "locking up a jury" can have no territorial limitations based on population if criminal juries are trying cases in any other jurisdiction in the State. The end to be accomplished by the Statute bears no relation to population but only relates in fact to the question of whether or not juries are trying a defendant in a felony criminal case.

A similar argument applies to equal protection where there is class legislation.

Equal protection to all is the basic principal on which rests justice under

the law, Pierre v.State of La. S.Ct.536, 306 U.S.354,83 L.Ed.757. By virtue of a clause in the 14th Amendment ot the Constitution of the United States expressly forbidding it to do so, a state may not deny to any person within its jurisdiction the equal protection of the laws. This clause is a promise of equal protection of the laws, and it means, and is a guarantee, that all persons subject to state legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed; the guarantee is to the protection enjoyed by other persons or classes in the same position and under like curcumstances, in pursuit of a lawful occupation. (See generally 16A C.J.S.. Constitutional Law, Sections 501 et seq.).

It is intended to secure and safeguard equality of right and of treatment against arbitrary discrimination. And while it operates only on legal rights otherwise created or existing and does not itself create any new legal rights, it is the general right to equal protection of the laws. Shelly v.Kraemer, 68 S.Ct.836,334 U.S.1,92 L.Ed 1161,3 A.L.R. 2d 441.

The constitutional right of equal protection of the law means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed on, others in a like situation. State v.Guirlando, 93 So.796, 152 La.570.

State and Municipal legislation is subject to the constitutional requirement

that no state may deny the equal protection of the laws to any person within its protection. Shelly v.Kraemer, supra. And it is valid as complying with, or invalid as violating, the requirement of equal protection as it does or does not, within the sphere of its operation, execute and treat alike with equality and uniformity, and without arbitrariness or unreasonableness or discrimination, all persons similarly situated. Goessart v. Cleary, 69 S.Ct.198,335 U.S.464,93L.Ed. 163; Shelly v.Kraemer supra. Messer v. Southern Airways Sales Co., 717 So.2d 679, 245 Ala.462.

The Prohibition against denia of equal protection does not preclude a State or Municipality from resorting to classification for purposes of legislation and confining the legislation to a cer-

tain class, Goessar v. Cleary, supra.; provided the classification or discrimination is reasonable rather than arbitrary and where it rests on a real and substantial difference or distinction which bears a just and reasonable relation to the legislation or the subject or object thereof. People v.Saltis, 160 N.E. 86,328 Ill,494, Loftin v.Crowley's, Inc., 8 So. 2d 909, 150 Fla.836; and provided also the legislation operates equally, uniformally and impartially on all persons within the same class. Barge v.Camp, 70 S.E.2d 360,209 Ga 38.

While legislation may confine its operation to areas having a designated population, including municipalities, that is, divided into classes based on population, the classification must be a natural one, bearing a reasonable rela-

tionship to the subject legislation, and not be arbitrary or capricious, as is the case with the statute under consideration Goessart v. Cleary,supra; Grigsby v.King, 260 P.789,202 Cal.299;Harbert v.Mabry, 51 S.W.2d 652,166 Tenn.290.

B. Fatal Variance

Although the fatal variance issue was not raised at trial, this matter is of such a nature as to clearly call it a matter that palpably prejudices the Petitioner's right to due process under the Fourteenth Amendment. Furthermore, the sufficiency of the indictment was clearly brought to the trial court's attention as appears in the Record at pages 36-39, at which point the County's Complaint (found at page 150 of Record) was introduced into evidence.

The indictment in this cause reads as follows:

"The Grand Jury of said County charge that before finding this indictment on, to-wit: June 12, 1976, Gabriel Hagendorfer did unlawfully sell to William Womack marihuana, one of the controlled substances enumerated in Title 22, Section 258 (29)(d), as set out in the Alabama Uniform Controlled Substances Act, against the peace and dignity of the State of Alabama." (Emphasis supplied)

The testimony adduced at trial shows in each case that Deputy Roland Howell was in truth and in fact the actual vendee, not Agent William Womack, as follows:

1. Appearing in the Record on page 35 in the testimony of William Womack to-wit:

"Q Tell me this: What denomina-

tions did Mr. Howell pay this man in?

A Denominations of money?

Q Yes. Do you know?

A I believe he gave him two twenties ($20.00) and a five ($5.00)."

2. Appearing in the Record on page 44 in the testimony of Roland Howell, to-wit:

"Q And did you pay him for the grass that you received?

A Yes, sir. Paid him forty-five dollars ($45.00).

Q Do you know what denominations the bills were?

A It seems like it was two twenties ($20.00) and a five ($5.00). I'm not absolutely sure, but I feel like that is what it was."

3. Appearing in the Record on page

47 in the testimony of Roland Howell, to-wit:

"Q When you bought this material from him, you were acting in your capacity as a law enforcement officer for Baldwin County and the State of Alabama, is that correct?

A Yes, sir.

Q The money that you used to make this buy was furnished by whom?

A By the Sheriff.

MR. COOPER:

Who?

A By the Sheriff.

MR. HENDRICKS:

Q By the Baldwin County Sheriff's Department?

A Yes, sir."

4. Appearing in the Record on page 59 in the testimony of Roland Howell, to-

wit:

"Q Who gave the money-Who passed the money to the Defendant here?

A I did.

Q And what denominations was it?

A The best I remember, it was two twenties ($20.00) and a five ($5.00).

Q And you got three packages for that, is that correct?

A Yes, sir."

5. County Court Complaint attached as Defendant's Exhibit #1 to the record as an unnumbered page 150 and referred to and admitted in evidence (R.39).

It is apparent from the testimony above set out that the Defendant sold the marijuana to Deputy Roland Howell for $45.00, money which Howell obtained for that purpose from the Sheriff of Baldwin County, not the Alabama Beverage Control

Board by way of its narcotics agent William Womack.

There was no sale from Womack to the Defendant, but the evidence shows a sale from the Defendant to Roland Howell in as much as the "transaction" fails to meet, in the former case, and does meet, in the latter case, the requisites for a sale as defined in Butler v.Thomson 92 U.S.414 (1875), wherein it states "Blackstone's definition as '(a) transmutation of property from one man to another in consideration of some price." The sale here was from Defendant to Roland Howell of marihuana in consideration of a price of $45.00.

The proof, therefore, is at absolute variance with the charge in the indictment wherein a sale to William Womack is charged.

There is no proposition of law more

fundamental than the one which requires that the proof at trial must correspond with the material allegations of the indictment. State v. Plunket, 2 Stew.11 (1829); Stone v. State,115 Ala.121,22 So. 275(1896); Owens v.State, 46 Ala.App.591, 246 So.2d 478(1971).

It is generally considered that where it is necessary in an indictment to state the name of a third person as a part of the description of the offense, that the name must be correctly stated in substance and a material variance is fatal. 42 C.J.S. Indictments and Informations Sec. 265. Wheaton v.State,29 Ala. App.231,194 So. 712 (1940).

The Court of Appeals speaking in the case of Parks v.State, 21 Ala.App.177, 106 So.218(1925) discussed a case wherein

an indictment charged the defendant with robbery of "Wesley Dukes" and testimony elicited the fact that one "J.W. Dukes" was robbed to which the Court stated:

> "As stated, the name of the person alleged to have been assailed, as laid in the indictment is "Wesley" Duke. This is a material averment and element of proof resting upon the state as to the identity of the offense. Morningstar v.State,52 Ala. 405; Nugent v.State, 19 Ala.540; McCaig v.State, 16 Ala.App.581,80 So. 155. It being a material averment and an essential ingredient of the offense, it was incumbent upon the state to adduce proof to sustain it (Shoults v. State, 19 Ala.App.19,94 So.777), and this was not done."

The Court went on further to say:

"This question involves a substantive right of defense; therefore the defendant was under no duty, when requesting the affirmative charge, to bring this failure of proof of this material and essential averment to the attention of the court before the conclusion of the argument of counsel." Thompson v. State, 48 Ala.165, 171. In the case of Morningstar v. State, supra, Chief Justice Brickell, for the court, said:

> "When an injury to the person or property of another is the offense charged, a material averment of the indictment is the identity of such person. If the name of such person is stated, a variance between the allegation and proof as to such name

> name is fatal.'
>
> 'The allegation and proof must correspond.
>
> Stone v. State, 115 Ala.121,22 So. 275."

The authorities are clear to the propositions stated above and to which Judge De Graffenreid succinctly stated the duty of the State in Garner v.State, 3 Ala.App.161,57 So.502(1912):

> "No proposition is more familiar than a man cannot be indicted for an offense, and under that indictment suffer a conviction of an offense not named in the indictment. A man cannot be indicted for the larceny of a horse, and under that indictment be convicted of the larceny of a mule." (Emphasis supplied.)

C. Duin v. State Should Be Overruled.

The present case is surely an example of the dangers which can occur in allowing indictments to be inspecific, thereby depriving the criminal defendant of due process of law. Consequently, Duin v. State, 288 Ala.329,260 So.2d 602 (1972), should be overruled by this Honorable Court. Cases such as Duin v. State are a mandate for inspecific indictments, a practice which this Court surely cannot condone.

In this particular case, as discussed above, the indictment names only William Womack as vendee in the marihuana sale, but the evidence adduced at trial goes to show "one-joint transaction" with both William Womack and Roland Howell

as the vendee.

As a result of said variance between the indictment and the evidence adduced at trial, which is authorized by the Duin precedent, the testimony of Petitioner (R.110) would be a confession to a sale of marihuana to Roland Howell in a Florida prosecution, if taken together with the testimony of Mary Frank, the Petitioner's witness (R.89). There exists no protection for Petitioner's rights of due process (i.e.-privilege against double jeopardy) by this mode of Alabama indictment. In essence, the Petitioner is subject to being prosecuted in Florida for a sale to both officers, Womack and Howell, even though he has already been convicted in Alabama on the "one joint transaction" theory. Such a state of affairs is patently unjust, and should

be remedied by overruling the dangerous precedent of Duin v. State.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

J. Michael Druhan, Jr.
Attorney for Petitioner,
Gabriel Hagendorfer

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing petition have been served on Respondent, the Honorable William J. Baxley, Attorney General of the State of Alabama, on the 22nd day of November, 1977, by United States Mail, postage prepaid, and properly addressed.

J. Michael Druhan, Jr.

APPENDIX

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May 24, 1977

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM 1976-77

1 Div. 784

Gabriel Hagendorfer

v

State

Appeal from Baldwin Circuit Court

TYSON, PRESIDING JUDGE

Gabriel Hagendorfer was charged by the indictment with unlawfully selling marihuana to William Womack, on June 12, 1976, contrary to the provisions of the Alabama Uniform Substances Act.[1, 2]

---

1. Title 22, Section 258(29)(d), Code of Alabama 1940, as amended 1971.

2. Appellate counsel did not represent the appellant on trial of this cause.

The jury's verdict found the appellant guilty as charged, and the trial court entered judgment which set sentence at six years imprisonment in the penitentiary.

The appellant asserts four contentions on appeal which arise from the following testimonies at trial conducted November 8, 1976, in the Circuit Court of Baldwin County.

William H. Womack, a State Narcotic Agent with the ABC Board, and Roland Wayne Howell, a Deputy Sheriff with the Baldwin County Sheriff's Department, testified that they were together on the evening of June 12, 1976, when they first encountered the appellant, Gabriel Hagendorfer, near the baseball park in Pensacola, Florida. They had driven to this location from near Elberta in Baldwin

County in the company of the appellant's brother, Billy Hagendorfer, and a girl named Mary Frank. Subsequently the officers followed the appellant back across the "Lillian Bridge" along U.S.Highway 98 until it intersected with County Road 87, just east of Elberta where the appellant turned off. The appellant was driving a Chevrolet Camero, and the two officers were following in an unmarked automobile. The appellant pulled up a couple of a hundred yards, stopped, and the two officers pulled up beside him. The appellant advised them, "It's right here," and proceeded to fill three plastic sandwich bags, commonly called "baggies," and the two officers paid him $45.00, two twenties, and a five dollar bill. He then handed the three bags of marihuana to the

Officers. This transaction took place between five and ten minutes, and occurred between 10:00 and 10:30 o'clock on the evening of June 12, 1976 (R.pp.20-21).

The two officers shortly thereafter delivered the three plastic bags to Deputy Gene Kinsey, who placed them in a manila envelope and marked the envelope with his initials, then delivered this envelope to Chief Deputy Sheriff James W. Anderson, Jr.

The following morning, June 13, 1976, Deputy Larry Linder received the manila envelope from Chief Deputy Anderson about 9:00 a.m., and after examining it and finding that it contained three plastic bags of marihuana, he initialed the envelope and delivered it to State Toxicolo-

gist James L. Small at the Mobile office.

Mr. Small testified that he performed two scientific tests on the contents of the three plastic bags in addition to examining the substance through a microscope. Mr. Small testified that the total weight of the green plant material was 61.2 grams, and that it was marihuana.

The appellant presented the testimony of Mary Frank and his brother, Billy Hagendorfer, in addition to his own testimony, which did not vary from the testimonies of Officers Womack and Howell, except that the defendant's witnesses contended that the sale of the marihuana to Officers Womack and Howell took place in Florida before they crossed the Lillian Bridge into Baldwin County.

I

The appellant first contends that

the State failed to prove a prima facie case in that the alleged marihuana was never admitted into evidence.

We have carefully examined this record and determined that the substance was marked for identification on motion of the District Attorney, Mr. Hendricks, as State's Exhibit 2, and was exhibited to the jurors with the statement from Mr. Hendricks, "We want to introduce these three packages, these three things in evidence here, and you can combine them." No objections were interposed by the appellant, nor was there an issue made at trial to this offer of this proof.

We are of the opinion that the State here established through the testimony of the several officers a prima facie case, and that venue of the offense was also

properly established. Hill v. State, 56 Ala. App. 369, 321 So.2d 708, cert. denied 295 Ala.___,(sic.), 321 So. 2d 713.

Moreover, the State Toxicologist, Mr. Small, and three of the officers identified the substance in question as marihuana. This was without objection or exception. We, therefore, are of the opinion that the appellant's argument is not well taken. Gamble v. State, 48 Ala. App. 605, 266 So. 2d 817; Simpson v.State, 51 Ala. App. 279, 284 So. 2d 734; Hill v. State, supra; Means v. State, 51 Ala. App. 8, 282 So. 2d 356, cert.denied 291 Ala. 792, 282 So. 2d 359, and authorities therein cited.

Moreover, the appellant's own witnesses at trial identified the substance as marihuana. Thus, no error is shown.

II

The appellant also contends that there was a fatal variance between the indictment and proof on trial since the evidence established a sale to Deputy Sheriff Roland Howell "when the indictment charged the unlawful sale of marihuana to William Womack."

At the outset, we note there was no demurrer imposed to the indictment, nor was the sufficiency of this indictment raised at trial. Where, as here, the indictment follows substantially the language of the statute, but simply fails to set out the name of the vendee, such was nevertheless sufficient to support a judgment of conviction. Duin v. State, 288 Ala. 329, 260 So. 2d 602, and authorities cited therein.

In the case at bar, however, the indictment simply averred the name of Agent Womack when the proof on trial affirmatively establishes that both officers participated in the purchase from the appellant, and each was handed at least one plastic bag of marihuana at the time of the alleged sale (R.pp.20-22, and R. pp.41-48.)

We are of the opinion that this was one joint transaction, and the evidence was properly admitted as to the sale to the officers, Womack and Howell. Morrow v. State, 52 Ala. App. 145, 290 So.2d 209, cert. denied 292 Ala. 743, 290 So.2d 213, and authorities therein cited.

III

The appellant asserts that there was a prejudicial comment in the presence of

the jury by the district attorney just before the noon recess, wherein the following occurred (R.pp.39-40):

> "THE COURT: All right. Ladies and Gentlemen, we are going to recess for lunch. Let me caution you not to discuss this case with anyone, not even among yourselves. Do not allow anyone to discuss it in your presence. If they do, tell them you are on this Jury, and if they persist in discussing it with you or in your presence, please report that back to the Court. Let me caution you not to discuss this case with anyone.
>
> "MR. HENDRICKS: Are you going to keep them together?
>
> "THE COURT: No, sir. I have already discussed that with both of them. All right, Ladies and Gentlemen, you are excused. Let's try to get back here by 1:15.
>
> "(WHEREUPON, A RECESS WAS HELD,AFTER WHICH THE FOLLOWING OCCURRED:)

This argument, however, overlooks the agreement between the attorneys that the jurors could separate (R.pp.3-4), and

in addition, there was not objection or other motion with reference to the comment of the district attorney above shown. Therefore, no ruling of the trial court was invoked. In brief, the appellant seeks to assert the invalidity of Title 30, Section 97, Code of Alabama 1940, as being violative of the Fourteenth Amendment to the Constitution of the United States (Appellant's brief, page 9).

In Weathington v. City of Birmingham, 52 Ala. App. 77, 289 So. 2d 645, writ den. 292 Ala. 757, 289 So. 2d 649, we find the following discussion:

> "Further, to warrant a court in decreeing a statute void, its invalidity must be distinctly pointed out. Cooper v. Hawkins, 234 Ala.636,176 So.329.
>
> "Here, the alleged unconstitutionality of this act was not raised in the trial court. As stated in Williams v.City of Birmingham, 41 Ala.

App.208, 244 So.2d 713,cert.denied 272 Ala.671,133 So.2d 718, 'We are not at liberty to consider a a question which was not raised below.'

"There is no evidence or pleading pertaining to this issue in the record. Therefore, there is nothing for this Court to review on this alleged error. Williams v.State, 291 Ala. 505, 282 So. 2d 905."

Moreover, the argument here asserted by the appellant has been expressly rejected by the Supreme Court of Alabama in Young v. State, 283 Ala. 676, 220 So.2d 843.

IV

Finally, the appellant asserts that he was improperly impeached at trial with reference an alleged conversation which took place three or four days after the alleged sale in question between the appellant and the two officers at Wolf Bay Lodge. On Record page 114, during cross-

examination, we find the following colloquy:

"Q. Did you see either or both of these officers two or three days after this night that we are talking about?

"A. Yes,sir.

"Q. Where?

"A. At a place called Wolf Bay Lodge. It was a week to the day.

"Q. Did you talk to them?

"A. They talked to me.

"Q. They talked to you?

"A. Yes. They wanted to buy some more.

"Q. Did you tell one of these officers on that occasion, or both of them, that you were so bummed out of your mind on the night that you made the sale to them that you didn't even know how much you let them have or what they paid you?

"A. No, sir.

"Q. You didn't say that to these officers?

"A. No, sir.

"MR. HENDRICKS: That's all."

In rebuttal, both Officers Womack and Howell were called to the stand and were asked if in fact the appellant had made a statement in effect that "he was so bummed out of his mind that he did not remember," and each officer answered in the affirmative (Deputy Howell, R.pp. 116-117; and Agent Womack, R.pp.121-122).

We are of the opinion that the trial court was careful here to see that a proper predicate was laid for this impeachment testimony; and that in the first instance where the district attorney referred to Wolf Bay Lodge as Gulf Gate Lodge, such was corrected during the testimony of the two officers so that there was no question as to the place

where such statement was made, and moreover, that the time and essence of the statement were sufficiently called to the appellant's attention during the cross-examination shown above. We are of the opinion that this statement, being in effect an admission against interest, was properly admitted by the trial court. Blackwell v. State, 264 Ala.553, 88 So. 2d 347, and authorities therein cited.

We have carefully examined this record and find same free from error. The judgment is therefore

AFFIRMED.

All the Judges concur.

Court of Criminal Appeals
State of Alabama
P. O. Box 351
Montgomery 36101

John C. Tyson III
John O. Harris
John P. DeCarlo
John G. Bookout
William M. Bowen, Jr.
Judges

Mollie Jordan
Clerk

June 28, 1977

RE: Gabriel Hagendorfer v. State
1st Div. 784
Baldwin Circuit Court # 7327

The following decision has been handed down in the above-styled cause:

"June 28, 1977. Opinion corrected, application for rehearing overruled. All the Judges concur."

Please replace the front page of the opinion issued May 24, 1977, by the Court of Criminal appeals with the attached corrected page.

Mailing Address:
P. O. Box 157
Montgomery, Alabama 36101

Telephone: 832-6480

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

Re: SC 2710
EX PARTE: GABRIEL HAGENDORFER
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(RE: GABRIEL HAGENDORFER ..... vs.
Appellant
STATE OF ALABAMA) .....
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

___ Appeal docketed. Future correspondence should refer to the above SC number.

___ Court Reporter granted additional time to file reporter's transcript to and including

___ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

___ Appell___ granted 7 additional days file briefs to and including

___ Appellant(s) granted 7 additional days to file reply briefs to and in-

cluding

___ Record on Appeal filed

___ Appendix Filed

___ Submitted on Briefs

XXX Petition for Writ of Certiorari denied. No opinion.

___ Application for rehearing overruled. No opinion written on rehearing.

___ Permission to file amicus curiae briefs granted

___

August 26, 1977

s/J. O. Sentell
Clerk, Supreme
Court of Alabama